DRAFT NOT FOR FORMAL TRANSMISSION UNTIL REVIEWED BY COMMISSION STAFF

14 November 1974

MEMORANDUM

STAT TO: [redacted] IC Staff

FROM: William R. Harris

SUBJ: Procedures for formal security review of Murphy Commission intelligence panel papers.

On 13 November 1974 you informally (by telephone) indicated to me the possibility that statements by William J. Barnds in his draft paper, Intelligence Functions, might be determined to be properly classified at the "secret" level.(1) I expressed concern at the implications of this possible determination, with respect to the working papers of a Commission centrally concerned with the impact of arbitrary or overclassification of information upon the conduct of foreign policy.(2) Nevertheless, on 13 November 1974 I informed Mr. Barnds of your concerns, and reminded him that his draft (unclassified) paper was not for public release, without prior Commission approval. I also informed Mr. Fisher Howe, Deputy Executive Director of the Commission, who also expressed concern with respect to any determination of classification, but who I am sure will act responsibly in the resolution of any classification problem.

You will recall that earlier, concern was expressed respecting a proposed statement in a paper by Ambassador Belcher, and that this proposed statement was excluded from the revised draft paper. Where there is clearly a problem respecting possible compromise of classified information, the Commission will -- I am sure -- be careful to avoid such compromise. Unlike the issue presented with respect to the Belcher paper, the issue with respect to the Barnds paper -- if formally presented to the Commission -- is one of considerable complexity. At the outset it would raise the question as to whether the federal government may lawfully classify, in newly-developed documents written by private citizens serving as consultants to the federal government, information which has been officially disclosed in the past, both by conscious acts of senior officials and by a pattern of non-enforcement respecting leaks of this same information,(3) and by the prior judicial determination (res judicata in subsequent proceedings?) that, notwithstanding contracts of secrecy, such information may not be enjoined from publication.(4) If the executive branch were to determine that the matter is res judicata, as a consequence of the Marchetti case, or that an effort to classify would be arbitrary and capricious, an abuse of discretion, or otherwise in violation of law, then any mere policy preference of the NSCIC/Working Group would be moot, as that Group would not, I assume, attempt to exceed its lawful authority in classifying that which may not defensibly be classified nor seek to enforce that which the courts have determined should not be enforced.

If the NSCIC/Working Group seeks to classify the unclassifiable, it should be sure as to its legal authority. If there is a genuine security issue with respect to the Barnds paper, and if an executive agency with lawful authority determines to bring that matter to the attention of the Commission, such a determination should be undertaken as a formal matter, in writing to the Commission. Presumably, the legal authority to classify would be demonstrated, both with respect to the executive branch and, then, with respect to a paper written by a private citizen-consultant to the Commission on the Organization of the Government for the Conduct of Foreign Policy. This is not an inconsequential matter; it may be precisely the kind of policy problem respecting which the Commission ought to take testimony, if it is concerned about excessive or arbitrary classification decisions.

As you know, I personally would like to see the passage of soundly drafted legislation to protect foreign intelligence sources and methods from unauthorized disclcsure. It is precisely the kind of classification issue raised with respect to the Barnds paper which shakes the foundation of any responsible effort to strengthen criminal sanctions for unauthorized disclosure. At the minimum, instances such as this one undermine the credibility of any proposed statute -- such as the August 1974 Justice draft (Tab D in my paper) -- which proposes criminal sanctions without also providing for judicial review as to the reasonableness of a classification decision. It is my understanding that the Director of Central Intelligence does not necessarily favor classification of matters already officially released (such as those in the Barnds paper). But others who would so classify that previously released ought to fully examine the legal and policy implications of their proposals.

I would suggest that informal consultations be initiated with Mr. Fisher Howe, Deputy Executive Director of the Murphy Commission staff, with respect to the possibility that a classification issue would arise in connection with the Barnds paper #1. If so, paper #2 should also be a subject of concern. Thereafter, any formal initiation of classification review proceedings should be a formal matter for written transmission to the Commission, and not to me as a consultant to that Commission.

When I see you on November 18th this subject is one we ought to discuss, should you or others be so interested.

W.R.H.

Notes

(1) The draft paper of October 24, 1974, on Intelligence Functions, states, inter alia, that "...reconnaissance satellites...enabled the United States steadily to increase its knowledge of the Soviet military establishment...(p.3) "One of the most...important types of information...is that derived from photographic reconnaissance. This originally was done largely by airplanes ...but much of it is now done by satellites.....The photoreconnaissance effort is operated by the Air Force.... (p.19)

(2) The Murphy Commission has undertaken to examine the classification of executive information relating to the conduct of foreign policy and the impact of such classification and declassification practices upon the conduct of "public diplomacy." Further, the intelligence panel paper by W. R. Harris raises issues respecting the adequacy of Title 50 App. §403(d)(3) as a standard for the protection of intelligence and the adequacy of intelligence declassification.

(3) "...the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements....It precludes such restraints with respect to information which is unclassified or officially disclosed...." U.S. v. Marchetti, 466 F. 2d 1309 (C.A. 4, 1972). Further, a pattern of non-enforcement respecting unauthorized disclosures may preclude protection of the criminal laws. See U.S. v. Heine, F. 2d (C.A. 2, 1945, Hand, J.) As a consequence of Mr. Nelson's admission that only factually accurate information could be enjoined (see J. Marks, in Foreign Policy (1974)), contested release of the boldface passages in Marchetti & Marks, The CIA and the Cult of Intelligence, be treated as an involuntary but official, judicially-sanctioned release and confirmation of such information -- irrespective of governmental intent. Statements by Lyndon B. Johnson, when President of the United States, and by Secretary of Defense McNamara, when Secretary, inter alia, constitute other official releases. Whether the release is in documentary form, or forms the basis for subsequent documents, is immaterial.

(4) New York Times Co. v. U.S., 403 U.S. 713 (1971), U.S. v. Marchetti, 466 F. 2d 1309 (1972); Knopf v. Colby, ___ F. Supp. ___ (D.C.S.D.N.Y. pending).